MAHABIR PRASAD v. MAHABIR PRASAD

[F.C. (Raja Azlan Shah Ag. L.P., Wan Suleiman & Salleh Abas F.JJ.) July 15 & 22, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 118 of 1981]

Family Law — Custody of infants — Separation deed giving custody to father — Mother obtaining divorce in India — Custody awarded to mother — Whether father estopped from obtaining order for custody in Malaysia — Jurisdiction of courts in Malaysia — Discretion of judge — Whether custody final and conclusive — Change of circumstances — Welfare of infants.

Conflict of Laws — Order of foreign court of competent jurisdiction — Custody order — Whether local court bound to give effect to it — Discretion — Paramount consideration given to infant's welfare.

In this case the parties were married in Bombay, India. The father was a Malaysian citizen and the mother an Indian citizen. The father left India in 1974 but the mother and the two infant daughters remained and lived in India. They came over to Malaysia in 1978. In 1980 the marriage broke down and the parties entered into a Deed of Separation by which the custody of the infants was given to the father. The mother returned to India and obtained a dissolution of the marriage. The court in India awarded custody of the infants to the mother.

The father applied for custody of the infants in the High Court at Kuala Lumpur but was unsuccessful as the learned judge held that he was estopped from making the application as the decision of the court in India was conclusive as against him and also because on the merits he had not shown any change of circumstances to re-open the custody order granted by the Indian court. The father appealed.

Held: (1) in a case like this the infants' welfare is of paramount consideration and the court in whose jurisdiction the infants happen to be should give effect to the foreign judgment without further enquiry only when it is in the best interest of the infants that the court should not look beyond the circumstances in which the foreign jurisdiction was invoked;

(2) although the courts in Malaysia must take into consideration the order of a foreign court of competent jurisdiction, they are not bound to give effect to it if this would not be for the infants' benefit;

(3) in this case the learned judge erred in the exercise of his discretion as the determination arose from an error of law;

(4) the learned judge was also wrong in law in coming to the conclusion that on the merits the father could not succeed. Change of circumstances may be brought into the picture to reverse a decision of the court, as a custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare and happiness of the infants are the paramount consideration;

(5) in such a case there should be comprehensive information, that is, information not only dealing with the merit or otherwise of the parents involved in the dispute, but also information related to the infants. Only after a hearing in which all the aspects of the case had been gone into would the court be able to arrive at a firm finding as to what was for the benefit of the infants;

(6) in this case the proceedings must be remitted for a rehearing before another judge and pending further order the custody of the infants should remain with the father.

Cases referred to:-

(1) *Teh Eng Kim* v. *Yew Peng Siong* [1977] 1 M.L.J. 234, 239.

(2) *Mc Kee* v. *Mc Kee* [1951] A.C. 352.

(3) *Robinson* v. *Williams* [1965] 1 Q.B. 89, 100.

(4) *B.* v. *W.* [1979] 1 W.L.R. 1041, 1055.

FEDERAL COURT.

L. Fernando (*Miss V. Alahakone* with him) for the appellant.

K. Anantham for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P. (delivering the judgment of the Court): This is an application for custody by the father of two infant daughters aged 7 years and 8 years respectively. The father is a Malaysian citizen and the mother an Indian citizen. They were both married in Bombay, India in 1972; the infants were born there. The father left India in 1974 but the mother and the infants remained and lived in India. They came over to Malaysia in 1978. In January, 1980 the marriage broke down. The parties entered into a Deed of Separation by which custody of the infants was given to the father. The mother returned to India.

In March, 1980 the mother filed a divorce petition for dissolution of the marriage in the City Civil Court of Bombay and on the same day filed notice of motion for the custody of the infants. The father was represented at the hearing. The Bombay Court made an interim order granting custody to the mother pending the trial of the divorce petition. The father gave an undertaking to produce the infants on the date fixed for hearing. On that date, December 8, 1980, the father failed to appear and produce the infants. On December 16, 1980 the Bombay Court granted an order of dissolution of the marriage and awarded custody of the infants to the mother.

On December 15, 1980 the father unsuccessfully instituted custody proceedings in the Kuala Lumpur High Court. The learned judge was of the view that the father was estopped from making the present application stating that the decision of the Bombay Court was conclusive as against the father and it was not open to him to ask for another order in this court on the same matter in which he had agreed to accept the decision of the Bombay Court. Another reason for disallowing the application was that on the merits the father had not shown any change of circumstances to re-open the custody order granted by the Bombay Court.

As we see it the appeal is one against the exercise of a discretion by the learned judge and accordingly the father must show that the learned judge erred in exercise of the discretion in accordance with the principles enunciated by this court in *Teh Eng Kim* v. *Yew Peng Siong*.[1]

In a case of this nature the courts in this country have jurisdiction to hear a custody case. The High Court in hearing a custody case regarding infants within jurisdiction is invested with an inherent jurisdiction which is derived from the Crown's prerogative powers as *parens patriae*. The problem which this court has to face in circumstances of this kind is not new and the question to be asked is from what angle ought we to approach the case, and how far is there any restriction imposed upon the course which we should take by reason of the order of foreign court of competent jurisdiction granting custody to the mother? There are many well known cases on the subject and we think we need only refer to the Privy Council decision of *McKee* v. *McKee*[2] which was cited to the learned trial judge where the Judicial Committee re-affirmed that the infant's welfare is of paramount consideration and that the court in whose jurisdiction

the child happens to be should give effect to the foreign judgment without further enquiry only when it is in the best interest of that infant that the court should not look beyond the circumstances in which the foreign jurisdiction was invoked. It is the law of this country as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication. Consequently, although our courts must take into consideration the order of a foreign court of competent jurisdiction, we are not bound to give effect to it if this would not be for the infant's benefit. We cannot regard that order as rendering it in any way improper or contrary to the comity of nations if the courts in this country consider what is in his best interest. Such an order cannot from its nature be final or irreversible. It is only of persuasive authority.

We are satisfied the learned judge erred in the exercise of his discretion as his determination arose from an error of law. In view of the manner in which he approached his decision, we are unable to determine whether the conclusion reached by him served the best interest of the infants and we would add that this is not a case where this court should substitute its own findings for that of the learned trial judge.

We are of the opinion that the learned judge was also wrong in law in coming to the conclusion that on the merits the father could not succeed. He said that if at all there was any allegation of change in the circumstances, it was only an allegation that the infants had expressed their strong decision to remain in Malaysia under the father's custody, an allegation to which he attached little importance. Change of circumstances, in our view, may be brought into the picture to reverse a previous decision of the same court, even though differently constituted. In such a case the matter is never *res judicata*. A custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but, will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare and happiness of the infants are the paramount considerations.

We echo the statement of the law by Widgery J., (as he then was) in *Robinson* v. *Williams*[3]:

"The cases all now show that the fact that justices have refused to make an order in favour of the mother on an earlier occasion does not create any estoppel in the event of her seeking to obtain an order against the same man on a subsequent occasion. It is quite clear that the facts are not res judicata and there is no provision in any statute which requires either that fresh evidence or additional evidence should be produced on a second or subsequent application. In my judgment the only reason why fresh or additional evidence is required in practice is the reason given by Oliver J. at the end of his judgment in *Rex* v. *Sunderland Justices, Ex parte Hodgkinson*, [1945] K.B. 502, 509; 'It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision of its own.' If the justices are invited in effect to reverse a previous decision of their own upon the same grounds and the same evidence, they would obviously take the direction of Oliver J. But if the evidence is different in the sense that it raised different considerations and justifies a reassessment, it seems to me proper for the justices to embark upon a second consideration of the matter."

Despite the mass of affidavit evidence, there is little information of the infants who are the central figure in the case. It has always been accepted that judges are entitled to see the infants and each of the parents in private. That was not done in this case. We feel that there should be comprehensive information; information not only dealing with the merit or otherwise of the parents involved in the dispute, but also information related to the infants. Only after a hearing in which all the aspects of the case had been gone into would he been able to arrive at a firm finding as to what are for their benefit. Anything short of this would leave the father with the smarting feeling of injustice.

We propose to deal with this appeal on the basis suggested by Lord Scarman in *B.* v. *W.*[4] that where the Court of Appeal is satisfied that the order was wrong but unsure on the evidence what order ought to be made, the court can remit the case to another judge with such directions for the care and control of the child in the meantime as it thinks best in the children's interest.

The appeal must be allowed and the proceedings remitted for a rehearing before another judge. Our decision to allow the appeal is on a point of law only and it does not relate to the substantive merit of the case. Pending further order the custody of the infants will remain with the fatner. The mother is to have access to the infants on terms to be agreed upon between the parties.

Appeal allowed.

Solicitors: *Zain & Co.; Skrine & Co.*

SUN KEE & CO. v. CHOP SIN HUA HIN & ANOR.

[F.C. (Raja Azlan Shah C.J., Abdul Hamid F.J. & Abdoolcader J.) May 20 & July 23, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 70 of 1980]

Practice and Procedure — Execution of judgment — Order for sale of land by public auction — Application to restrain sale — R.S.C., 1957, O.43 r.11.

In this case the first respondent had obtained judgment against the appellant and subsequently obtained an order for the sale of lands belonging to the appellant by public auction. On the day the sale was fixed the appellant applied for an injunction to restrain the sale. The sale however proceeded and the lands were sold to the second respondent. The appellant thereupon applied for an order for the sale to be set aside. This application was dismissed in the High Court and the appellant appealed. The appellant contended *inter alia* (1) that the reserve price should not have been disclosed; (2) that no provision was made for the two lots of land to be offered for sale separately; and (3) the reserve price fixed was below the market value of the lands.

Held, dismissing the appeal: (1) the incorporation of the reserve price in the order and the fact that the two lands were not directed to be sold separately were not irregularities which could vitiate the sale. The appellant could have urged an order in those terms but as he did not do so, it must be taken that he was willing to let the summons for sale go by default or implied consent;

(2) there was in the circumstances no justification for any complaint with regard to the reserve price fixed.

FEDERAL COURT.

Dato Morris Edgar for the appellant.